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George H. Conn v. Rich Whitmore : Brief of Respondent

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; Counsel for Respondent;

Case No. 8927

IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE H. CONN,
Plaintiff and Appellant,

—vs.—

RICH WHITMORE,
Defendant and Respondent.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

(Numbers in parenthesis refer to pages of the record. The parties will be referred to here as they appeared in the court below.)

STATEMENT OF FACTS

This is an appeal from a judgment entered in favor of defendant and against plaintiff. The action was based upon an alleged judgment obtained by plaintiff against defendant in Illinois. No personal service was made upon defendant in Illinois. He was served in Utah. Plaintiff sought to bring himself within paragraphs 16 and 17 of Chapter 110, Illinois Revised Statutes, 1955. The trial court held the Illinois court had no jurisdiction over defendant and the judgment was void and hence entered judgment for defendant.

Plaintiff, in his brief, makes no effort to make a statement of facts. The facts underlying the attempted assertion of jurisdiction are material in the determination of this case.

Plaintiff was a veterinarian and in the business of selling Arabian horses. His place of business was at Freeport, Illinois. Under date of February 1, 1955, he sent to plaintiff by mail (16) an offering of registered Arabian horses (Exhibit D-3). The two horses eventually purchased by defendant were there listed. So far as material here such offer provided:

> "Khiffraff * * * We are making very attractive price on this filly of $1,000.00.
> "* * * Khiffah * * * bay mare, 19 years old * * * we are going to price this mare at less than her 1955 foal should be worth. The price is $750.00."
>
> (Exhibit D-3)

Some time in April plaintiff wrote defendant in an attempt to sell him three horses. Then he wrote another letter stating that one of them was already sold and if defendant wanted the other two, he better make up his mind about it (15). Defendant recalled that he had a friend by the name of Dr. Wm. L. Monson who lived near plaintiff. He called Dr. Monson on the telephone and asked him to check the quality of plaintiff's horses. He reported favorably (13, 15, 16). Defendant mailed a letter from Salt Lake City accepting the offer and enclosing a check for $1,000.00, part payment for the two horses (18). Defendant then sent Mr. Carpenter, his employee, to Freeport, Illinois, to pick up the horses (13, 14). He took

with him a check for $750.00 which he delivered to plaintiff at the time he picked up the horses (14).

These are the basic facts upon which the trial court rendered judgment for defendant.

STATEMENT OF POINTS

POINT I

THE ILLINOIS JUDGMENT HEREIN SUED UPON IS NOT ENTITLED TO FULL FAITH AND CREDIT UNDER THE UNITED STATES CONSTITUTION BECAUSE SAID JUDGMENT IS VOID FOR LACK OF JURISDICTION.

POINT II

THE ILLINOIS STATUTE RELIED UPON BY PLAINTIFF TO VALIDATE HIS JUDGMENT WAS NOT APPLICABLE BECAUSE DEFENDANT DID NOT TRANSACT ANY BUSINESS WITHIN THE STATE OF ILLINOIS WITHIN THE MEANING OF THAT STATUTE.

POINT III

IF THE ILLINOIS STATUTE WERE HELD APPLICABLE TO THIS CASE THEN SUCH CONSTRUCTION WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

ARGUMENT

POINT I

THE ILLINOIS JUDGMENT HEREIN SUED UPON IS NOT ENTITLED TO FULL FAITH AND CREDIT UNDER THE UNITED STATES CONSTITUTION BECAUSE SAID JUDGMENT IS VOID FOR LACK OF JURISDICTION.

It is thoroughly settled that the United States Constitutional provision (Article IV, Section 1), that full

faith and credit shall be given in each State to the judicial proceedings in other States does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered or into the facts necessary to give such jurisdiction.

It is also thoroughly settled that if the court did not have jurisdiction then any judgment rendered by it is void and would not come within the protection of the full faith and credit clause of the Constitution and other States would not need to enforce any of the terms or provisions of such judgment.

The following cases support the foregoing propositions: *Williams v. North Carolina,* 325 U.S. 226, 65 S.C. 1092, 89 L. Ed. 1577; *Milliken v. Meyer,* 311 U.S. 457, 61 S.C. 339, 85 L. Ed. 278; *Wampler v. Wampler,* 25 Wash. 2d 258, 170 P.2d 316.

Defendant here asserts lack of jurisdiction based on two propositions. Only through the provisions of Sections 16 and 17, Chapter 110 of the Revised Statutes of Illinois, 1955, could plaintiff obtain jurisdiction over defendant. The purchase by defendant of the two horses under the situation presented here could not bring this case within the provisions of that statute and hence the jurisdiction of the Illinois court fails upon that ground. The other proposition contended for by defendant only need be considered in the event defendant is not correct upon his first proposition. If this statute is made applicable to the factual situation presented in the case at bar,

then such application violates the Due Process clause of the Fourteenth Amendment.

Upon either of these grounds the Illinois court would lack jurisdiction and its judgment would be void.

POINT II

THE ILLINOIS STATUTE RELIED UPON BY PLAINTIFF TO VALIDATE HIS JUDGMENT WAS NOT APPLICABLE BECAUSE DEFENDANT DID NOT TRANSACT ANY BUSINESS WITHIN THE STATE OF ILLINOIS WITHIN THE MEANING OF THAT STATUTE.

Section 17, Chapter 110 Illinois Revised Statutes, 1955, so far as material here, provides:

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> "(a) The transaction of any business within this State;
>
> "(b) The commission of a tortious act within this State;
>
> "(c) The ownership, use, or possession of any real estate situated in this State;
>
> "(d) Contracting to insure any person, property, or risk located within this State at the time of contracting.
>
> * * *
>
> "(3) Only causes of action arising from acts enumerated herein may be asserted against a de-

fendant in an action in which jurisdiction over him is based upon this section."

It is the contention of plaintiff that this case falls within subdivision (a) of the foregoing statute. It should be observed that this was not the transaction of any business of the defendant. Plaintiff was the one that was in the business of selling horses.

Defendant had no office nor place of business in the State of Illinois, he merely accepted an offer by plaintiff to sell horses.

The acceptance of the offer occurred when defendant mailed the acceptance and $1,000.00 payment. For this reason the contract herein involved was not even made in Illinois. It was a contract entered into at the time the acceptance was mailed in Utah. 1 *Williston on Contracts,* Third Edition, Section 81.

Defendant picked up the horses through his agent. We submit that it was never contemplated by the enactment of this statute that this type of transaction would subject a buyer to the jurisdiction of the Illinois courts. If this is applicable, then persons buying by catalogue from mail order houses would be subject to the jurisdiction of the courts where the order is filled. The fact that an agent was sent to pick up the horses is only incidental and would not materially distinguish this case from a mail order case. Cases have construed this Illinois statute and indicate that the statute is not applicable here.

In *Grobark v. Addo Machine Company,* 18 Ill. App. 2d 10, 151 N.E. 2d 425 (1958), an action was commenced to recover damages for interference with contract rights.

A summons was served under the foregoing statute. A motion to quash the service was granted and on appeal affirmed. Plaintiff sold adding machines which it purchased from defendant. Defendant was a New York corporation not licensed to do business in Illinois and with its headquarters in New York. In 1953 defendant sent a letter to plaintiff appointing him exclusive distributor in the greater part of Illinois. Thereafter defendant advised plaintiff that the distributorship would be cancelled. In concluding that the defendant was not transacting any business within the meaning of this statute, the court pointed out that it maintained no offices in Illinois nor did it employ anyone there. We submit that this case is analogous to the present case and shows that there must be more of a contact with the State of Illinois than exists here in order to subject a person to the jurisdiction of its courts.

In Orton v. Woods Oil & Gas Company, 249 F. 2d 198, the court held the situation presented did not bring defendant within the Illinois statute and that hence the motion to quash the service of summons was properly granted. One plaintiff was a business engineering consultant and the other a lawyer. They performed the necessary work in Illinois to get defendant company organized and doing business. This work was performed in Chicago. The summons was served on defendant in Louisiana. In holding that the statute was not applicable, the court stated:

> "We shall not engage in a further definition of 'the transaction of any business within this

> State.' It is sufficient here to hold that the performance of the professional services by plaintiffs for the benefit of defendant as herein outlined, standing alone, are insufficient to bring defendant within any reasonable construction of the Act in question. To rule otherwise would be to stretch the doctrine of the International Shoe case to the breaking point, and to expand the Illinois concept of state jurisdiction over nonresidents beyond the limit imposed by due process."

Plaintiff cites the case of *Nelson v. Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673, as in point here. That case came within the provisions of subdivision (b) providing that if a person committed a tortious act in Illinois that person would be subjected to the jurisdiction of the Illinois courts. It has nothing to do with whether or not business was transacted within Illinois. The wording of subdivision (a) and (b) points up the distinction which should be made. Subdivision (a) does not provide that if a person enters into a contract with an individual in Illinois such person shall be subject to the jurisdiction of the court. It uses language long familiar to courts, to-wit: the transaction of any business. If the Legislature intended to cover the present situation it could have worded the statute so that it would include a situation where "a contract was made in Illinois." Subdivision (d) further confirms this contention. Under that subdivision if a person contracts to insure any person located within Illinois such person shall be subject to the jurisdiction of the courts. Here is a specific provision relating to a contract of insurance. If the Legislature had intended that all persons

who contracted in Illinois or with Illinois residents were subject to its courts this provision would be unnecessary because such a contract of necessity would be included within the provisions of subdivision (a). The use of specific language in subdivision (b) and (d) indicates that the general language in (a) has a broader application than to include one transaction of contract.

In *Rensing v. Turner Aviation Co.*, 166 F. Sup. 790, this latter distinction is suggested. The case involved a situation under subdivision (b), but the court, in considering this problem, stated:

> "Whether this court would also have jurisdiction over the person of the defendant by virtue of Section 17 (1) (a) is questionable since the Act by its express terms states that the cause of action must arise from the 'the transaction of any business within this State.' Further, in light of Orton v. Woods Oil & Gas Co., it might be difficult to maintain that the defendant's occasional, sporadic and irregular flights into Illinois amounted to such 'minimum contacts' with the territory of the forum so that the maintenance of a suit in personam would not 'offend traditional notions of fair play and substantial justice.' To do so might expand the Illinois concept of State jurisdiction over non-residents beyond the limit imposed by due process."

In that case the defendant chartered airplane flights into Illinois and on one of which plaintiff was injured.

The use of the words "any business" in the statute does not mean a single act would bring the person within the statute. In *Worcester Felt Pad Corp. v. Tucson Air-*

port Authority, 233 F. 2d 44, in construing the words "any business" it was held that it meant more than a single act. The court stated:

> "The words 'any business, enterprise, or occupation' do not refer to single act, but instead to a plurality of acts."

The statute does not say "any contract" or "any act," it uses the word "business" and the use of that word certainly contemplates that the individual must be in some type of business which he is transacting. It should not concern isolated purchases by a person not in any business connected with the sale.

The Utah cases clearly indicate that the type of transaction here involved is not the transacting of any business within the State of Illinois. Our Utah statutes use the words "doing any business" (Section 16-8-1, Utah Code Annotated, 1953) and interchange "doing" and "transacting" (Sections 16-8-2, 3).

In *Western Gas Appliances, Inc.* v. *Servel, Inc.,* 123 Ut. 229, 257 P.2d 950, dismissal of the case for lack of jurisdiction was affirmed. Plaintiff, for several years, had been a distributor of defendant's gas and electric home appliances. Defendant, a Delaware corporation, had its principal place of business in Indiana. Defendant terminated this contract with plaintiff and appointed another distributor. The law suit arose out of this termination. Service of summons was made upon the service manager of defendant who was temporarily within the

State. The attitude of our court on this subject was expressed as follows:

> "No authority has been cited which could support a conclusion, that the activities of defendant herein above enumerated, are sufficient to render a foreign corporation amenable to process. It is indisputable that the mere presence here of an officer of a foreign corporation will not subject it to suit, nor will the sale of goods at a foreign factory to an independent distributor located within this state; neither is the aiding of the distributor in his duties of promoting sales and servicing activities of independent dealers (retailers) through instructing or training them and their employees; nor the giving of a warranty and the shipping to an independent dealer the parts and units to meet its terms.
>
> "It is also well settled that an isolated transaction such as the installation of the one air-conditioning unit and heating system would not create the status of doing business here. As the court said in Dahl v. Collette:
>
> "'* * * if * * * (the corporation's presence) is manifested only by casual, sporadic, or isolated exertions of the kind which it ordinarily performs, these indicia of its presence are too equivocal and uncertain to support the inference that it is doing business here.'
>
> "Thus before defendant's acts could properly be classified as doing business within the State, it would have to be shown that there was some degree of continuity or regularity of such acts, coupled with some manner of entering into direct business transactions with others. If such circumstances did exist, the acts of defendant herein

shown might properly be considered in augmentation of other proof as to doing business.

"We are appreciative of the fact that the policy underlying decisions of the court in cases such as this requires consideration of fair play to citizens desiring to seek redress in court for claimed injuries, as well as to the fact that foreign corporations who do business here should not be afforded any unfair advantage against local competing companies who pay taxes and licenses for doing business here and are subject to the jurisdiction of our courts.

"But jurisdiction of citizens of other states may not be arbitrarily conferred by the law, nor assumed by the courts, of sister states. Under the federal constitution as interpreted by the United States Supreme Court, the authority of state courts over foreign corporations is limited to circumstances where they do 'business in the state * * * in such a manner and to such an extent that its actual presence there is established.'

"In this context, as noted in International Shoe Co. v. State of Washington, the term 'presence' is

" 'used merely to symbolize those activities of the corportion's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.' "

See also *McGriff v. Charles Antell, Inc.*, 123 Ut. 166, 256 P.2d 703; *Alward v. Green*, 122 Ut. 35, 245 P.2d 855; *Dykes v. Reliable Furniture & Carpet*, 3 Ut. 2d 34, 277 P.2d 969, *East Coast Discount Corp. v. Reynolds*, 4 Ut. 2d 362, 325 P.2d 853; *Prudential Federal Savings & Loan*

Assoc. v. Hartford Accident & Indemnity Co., 7 Ut. 2d 366, 325 P.2d 899.

The foregoing cases also stand for the proposition that a single transaction does not make a person amenable to the courts of the state wherein the transaction was had. Illinois has also ruled in accordance with these cases. *Finch & Company v. Zenith Furnace Company,* 245 Ill. 586, 92 N.E. 521.

In view of the fact that the contract for the purchase of the horses in the case at bar was entered into in Utah the following quotation from *Alward v. Green,* supra, is particularly applicable.

> "The fundamental difficulty with the plaintiff's contention in this case, under our rules, is that his cause of action did not arise out of any business transacted by him with the defendant in the State of Utah. His contract was made with the defendant in the State of California and is subject to the laws and rules and regulations of the State of California, and his cause of action is based upon a breach of his contract entered into with the defendant in the State of California."

Defendant, in his brief at Page 10, cites cases to the effect that statutes similar to that in Illinois have been upheld. These cases are not in point and the very language of the statutes involved in those cases indicate the inapplicability of the Illinois statute to the situation in the case at bar.

In *Smythe v. Twin State Improvement Corp.,* 116 Vt. 569, 80 A.2d 664, 25 A.L.R. 2d 1193, a Vermont statute provided that if a foreign corporation makes a contract

with a resident of Vermont to be performed in whole or in part in Vermont against a resident of Vermont, such act shall be deemed doing business and the corporation shall be subject to the jurisdiction of the courts of Vermont. In the first place this case sounded in tort and the statute specifically applied to the commission of a tort in Vermont. If a contract were involved the statute there would specifically cover the situation. The Illinois statute does not refer to a contract, but only relates to the transaction of any business.

In *Jones v. Bay State Abrasive Products Company,* 89 F. Sup. 654 and *Companie DeAstral v. Boston Metals Company,* 205 Md. 338, 107 A.2d 357, a Maryland statute was involved. That statute provided that every foreign corporation should be subject to suit in Maryland on any cause of action arising out of a contract made within Maryland whether or not such foreign corporation was doing business or had done business in the state. Here again, the statute specifically applies to a contract and not to the transaction of business. This alone distinguishes the cases involving the Maryland statute.

None of the above authorities cited by defendant would be applicable here because the contract was made in Utah not in Illinois. Here we have the startling contention that an Illinois court has jurisdiction over a resident in Utah who has made a contract in Utah with an Illinois resident. Under this principal how could it be asserted that it is either fair or dispensing substantial justice to subject to the jurisdiction of Illinois courts a Utah resident who happens to buy a couple of horses

from an Illinois resident. No case of which we are aware has gone this far in holding that a judgment rendered under such conditions would constitute due process of law. The most recent case by the United States Supreme Court, *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), does not go so far. In that case a California statute (similar to section 17 (1) (d) of the Illinois statute, supra) subjected insurance companies to the jurisdiction of California courts on insurance contracts with residents of that state even though the company could not be served in California.

No such situation exists in the case at bar. The defendant there was in the insurance business and the obtaining of a policy holder in California and the receipt of premiums was the transaction of its business in California. Such situation is a far cry from one where a Utah resident buys two horses from an Illinois resident and certainly is not the transaction of any of the Utah resident's business in Illinois.

We submit that under the foregoing authorities the purchase of these horses by defendant should not bring him within the terms of this Illinois statute thereby subjecting him to the jurisdiction of that court and render him liable upon a judgment made under such circumstances.

POINT III

IF THE ILLINOIS STATUTE WERE HELD APPLICABLE TO THIS CASE THEN SUCH CONSTRUCTION WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As indicated under Point II, it is our belief that the situation presented in the case at bar is not one which would come within the terms and provisions of the Illinois statute. However, if it does then it is a violation of the concept of due process of law as embodied in the Fourteenth Amendment to the United States Constitution.

Pennoyer v. Neff, 95 U.S. 714, 25 L. Ed. 565, was for many years the leading case on this question of jurisdiction and the enforcement of judgments in sister states. However, now the principles to be applied have now been established by the case of *International Shoe Company v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945). That case was a proceeding by the State of Washington to collect unpaid contributions to the unemployment compensation fund. Process was served in Washington on a sales solicitor employed by defendant company. Defendant's motion to set aside the order was denied and defendant was held subject to the jurisdiction of the Washington courts. Defendant was a Delaware corporation having its principal place of business in Missouri. It was engaged in the manufacture and sale of shoes. Defendant had no office in Washington, made no contracts either for the sale or the purchase of merchandise there, maintained no stock of merchandise and made no delivery of goods in intrastate commerce. During the years in question defendant had employed 11 to 13 salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen re-

sided in Washington. Their principal activities were confined to that state and they were compensated by commissions based upon the amount of sales. Defendant supplied these salesmen with a line of samples. On occasions they rented sample rooms in business buildings or hotels, for which defendant reimbursed them. The salesmen transmitted their orders to defendant in Missouri, which orders were subject to its approval. The court held that defendant was subject to Washington judicial jurisdiction. The court stated:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L. Ed. 565. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "
>
> * * *
>
> "Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away

from its 'home' or principal place of business is relevant in this connection."

* * *

"Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. St. Clair v. Cox, supra, 106 U.S. 359, 360, 1 S. Ct. 362, 363, 27 L. Ed. 222; Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 21, 27 S. Ct. 236, 240, 51 L. Ed. 345; Frene v. Louisville Cement Co., supra, 77 U.S. App. D.C. 133, 134 F.2d 515, 146 A.L.R. 926, and cases cited. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable burden on the corporation to comport with due process."

Tested by the principles there laid down, to make the Illinois statute applicable to the situation at bar would deny to defendant due process of law. It is to be noted that the minimum contacts with the state must be such that the maintainance of the suit does not offend traditional notions of fair play and substantial justice. Certainly to hold this defendant subject to Illinois jurisdiction would offend in the manner indicated. No case with such minimal contacts as here has been cited to uphold plaintiff's position.

This case expressly recognizes the rule that single or isolated activities are not enough to subject even a corporation, let alone an individual, to state jurisdiction. To

require this Utah resident to defend the action in Illinois under these facts would place too great and unreasonable a burden upon him "to comport with due process of law."

We submit that to give this statute the construction contended for by plaintiff would make it violative of the due process clause of the XIVth Amendment to the United States Constitution and hence void and not entitled to full faith and credit.

CONCLUSION

We respectfully submit that the judgment here sued upon does not come within the protection of the full faith and credit clause of the United States Constitution. The defendant's act of making a contract for the purchase of two horses from a resident of Chicago and then picking up the horses through an agent does not constitute the transaction of any business within Illinois within the Illinois statute. If this statute were so construed it would violate the due process clause of the United States Constitution and would hence be unconstitutional and a judgment based thereon would be void.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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